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### Renewing Human Rights Law in Canada

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Commentary



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## Renewing Human Rights Law in Canada

### Abstract

Human rights law was one of the great legal innovations of the twentieth century. And yet human rights agencies and practitioners face a backlash that has resulted in regressive legislative reforms in recent years. These reforms have only succeeded in undermining some of the key pillars of the Canadian model for human rights law. The following article places the current backlash within historical context. The author argues that many recent reforms have replicated the deficiencies of past anti-discrimination laws. Commissions and policy-makers must respond by building on the strengths of the original Canadian model by improving public education, engaging with Aboriginal peoples, focussing on prevention, and supporting research and advocacy.

### Keywords

Civil rights; Law reform; Canada

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## Commentary

## Renewing Human Rights Law in Canada

DOMINIQUE CLÉMENT\*

Human rights law was one of the great legal innovations of the twentieth century. And yet human rights agencies and practitioners face a backlash that has resulted in regressive legislative reforms in recent years. These reforms have only succeeded in undermining some of the key pillars of the Canadian model for human rights law. The following article places the current backlash within historical context. The author argues that many recent reforms have replicated the deficiencies of past anti-discrimination laws. Commissions and policy-makers must respond by building on the strengths of the original Canadian model by improving public education, engaging with Aboriginal peoples, focussing on prevention, and supporting research and advocacy.

Le droit en matière de droits de la personne a été l'une des grandes innovations juridiques du XXe siècle. Pourtant, les organismes et les professionnels des droits de la personne subissent aujourd'hui un retour de bâton, comme en témoigne l'adoption de réformes législatives régressives au cours des dernières années. Ces réformes ont eu pour effet de miner quelques-uns des piliers essentiels du droit canadien en matière de droits de la personne. Cet article analyse l'actuel retour de manivelle dans une perspective historique. L'auteur fait valoir que de nombreuses réformes récemment adoptées reproduisent les lacunes des anciennes lois contre la discrimination. Face à cette situation, les commissions et les décideurs politiques doivent exploiter les atouts du modèle canadien d'origine en sensibilisant davantage le public, en nouant le dialogue avec les populations autochtones, en mettant l'accent sur la prévention et en appuyant la recherche et les activités de défense des intérêts.

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**ONE OF THE MOST DIFFICULT CASES** to confront a human rights commission or tribunal in Canada in recent years dealt with funding for child welfare services on Aboriginal peoples' reserves. The First Nations Child and Family Caring Society of Canada filed a complaint with the Canadian Human Rights Commission arguing that underfunding child welfare services constituted discrimination on the basis of race and national or ethnic origin.<sup>1</sup> Initially, the Canadian Human Rights Tribunal rejected the case because it was beyond their mandate. The Federal Court of Appeal, however, ordered the Tribunal to hear the case. In 2016, the Tribunal ruled that underfunding on reserves was discrimination and therefore a violation of the *Canadian Human Rights Act*. The case exemplifies how human rights commissions and tribunals are facing increasingly complex complaints.

Recent developments, however, are threatening to undermine the ability of commissions and tribunals to address such complex cases. Canada had, by the 1970s, created a sophisticated anti-discrimination legal regime. But a backlash that began in the mid-1980s has weakened our human rights system. The perception that individuals are exploiting human rights statutes to advance vexatious claims has fuelled this backlash. It has led even ardent supporters to call for reform, which has resulted in regressive amendments to many statutes. I argue that we have moved too far away from the original model of human rights law in Canada. Recent reforms have, in some cases, exacerbated rather than solved the problems that they were meant to solve.

Canada's human rights legal regime, of which anti-discrimination law is central, is complex. It includes the *Canadian Charter of Rights and Freedoms*, federal and provincial human rights legislation, international treaties, and legislation from privacy laws to official languages. I focus on federal and provincial human rights statutes and their enforcement mechanisms (*i.e.*, commissions

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1. *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, 2 CNLR 270; *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75, 226 ACWS (3d) 813.

and tribunals). Although they are primarily anti-discrimination law, I refer to this legal regime as human rights law, in part, because legislatures have chosen to label these statutes as human rights. Moreover, Quebec and Saskatchewan's statutes are not limited to anti-discrimination provisions, but include a broad range of human rights. And several other statutes include hate speech provisions. Public discourse in Canada around this legal regime, as well as a great deal of the scholarship, similarly frames these statutes as human rights law.<sup>2</sup> This is reflected in the way people are appealing to human rights statutes to address an expanding range of issues, from poverty to health care and education. At the same time, equality cases often engage with rights issues beyond discrimination: Hate speech complaints raise issues around free speech, while discrimination against welfare recipients or Muslims are about economic rights or religious freedom.

The literature on human rights law in Canada focuses predominantly on legislation, policy, and litigation.<sup>3</sup> This includes long-standing debates over their legitimacy, especially regarding due process, hate speech, or duty to accommodate.<sup>4</sup> Recent reforms have inspired further debate on whether or not a direct-access model—which eliminates the role of a commission in vetting

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2. See, for instance, Shelagh Day, Lucie Lamarche & Ken Norman, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).
  3. R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000); Colleen Sheppard, "The Promise and Practice of Protecting Human Rights: Reflections on the Quebec *Charter of Human Rights and Freedoms*" in *Mélanges*, ed Paul-André Crépeau (Cowanville, ON: Les Éditions Yvon Blais, 1997); John Hucker, "Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality" (1997) 19:3 Hum Rts Q; Lucie Lamarche, *Le régime québécois de protection et de promotion des droits de la personne* (Montreal: Les Éditions Yvon Blais, 1996).
  4. Kathleen Ruff, "A Critical Survey of Human Rights Acts and Commissions in Canada" in eds, Walter S Tarnopolsky, Joyce Whitman & Monique Ouellette, *Discrimination in the Law and the Administration of Justice* (Toronto: Canadian Institute for the Administration of Justice, 1992); Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (Ottawa: Canadian Human Rights Commission, 2012); Richard Moon, "The Attack on Human Rights Commissions and the Corruption of Public Discourse" (2010) 73:1 Sask L Rev; Howe & Johnson, *supra* note 3; Wanda Wieggers, "Feminist Protest and the Regulation of Misogynist Speech: A Case Study of *Saskatchewan Human Rights Commission v Engineering Students' Society*" (1992) 24:3 Ottawa L Rev; Rainer Knopff, *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1989); Lucie Lemond & Andée Côté, *Discrimination et commission des droits de la personne* (Montreal: Editions Saint-Martin, 1988).

complaints—is more accessible.<sup>5</sup> In addition to the need to recognize substantive equality in human rights law, there has also been some effort to recognize the intersectionality of discrimination.<sup>6</sup> Another key theme in the scholarship on human rights law is the essential role that social movements play in the creation and enforcement of the law.<sup>7</sup> Most of these studies, however, largely fail to place these developments in a historical context. It is worth considering how human rights law has changed over time, and how past practices can inform future directions. This is an ideal time to debate the future of human rights law given the recent opening of a national museum dedicated to human rights as well as the emergence of new leadership among several prominent commissions or tribunals in Canada.

As the First Nations Child and Family Caring Society of Canada case demonstrates, human rights commissions and tribunals are facing a growing number of complex cases that address a broad range of grievances. In the following commentary I trace the origins of federal and provincial human rights statutes and their enforcement mechanisms. I then describe the backlash, particularly as it is manifest in legal reform. The final section offers a roadmap for the future. In particular, I argue that we need to focus on education, engaging with Aboriginal peoples, legal reform, research, and community engagement. It is a vision that is rooted, in part, in the original Canadian model for human rights law. Although

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5. Mary Cornish, Fay Faraday & Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora, ON: Canada Law Books, 2009); Pearl Eliadis, *Speaking out on Human Rights: Debating Canada's Human Rights System* (Montreal: McGill Queen's University Press, 2014); Day, Lamarche & Norman, *supra* note 2.
  6. Kamini Steinberg, *The Ontario Human Rights Code: Implications for an Intersectional Approach to Human Rights Claims* (LLM Thesis, University of Toronto Faculty of Law, 2009) University of Toronto Press; Denise G Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:1 Osgoode Hall LJ; Diane Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37; Shelagh Day, *Reassessing Statutory Human Rights Legislation Thirty Years Later: Affirmative Action and Equality Concepts* (Ottawa: Human Rights Research and Education Centre, 1995) [Day, "Reassessing"]; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19:1 Queen's LJ; Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6:1 CJWL 25.
  7. Rosanna L Langer, *Defining Rights and Wrongs: Bureaucracy, Human Rights, and Public Accountability* (Vancouver: UBC Press, 2007); Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002); Dominique Clément, "The Social Movement Society and the Human Rights State" in eds Howaard Ramos & Kathleen Rodgers, *Protest and Politics: The Promise of Social Movement Societies* (Vancouver: UBC Press, 2015) [Clément, "Social Movement"].

it is essential that governments reinvest in our human rights system, we also need to revisit the mandate and priorities of human rights agencies.

## I. THE CANADIAN MODEL

Canada has some of the oldest human rights laws and agencies in the world. There were barely a dozen national human rights institutions around the world by the 1980s, primarily in Western Europe and North America.<sup>8</sup> As a result, when the original Canadian human rights laws were introduced in the 1940s and 1950s, there were few precedents. Other than a few minor amendments to a handful of statutes to prohibit discrimination in targeted sectors, there were no laws banning discriminatory practices in Canada.<sup>9</sup> A growing awareness of discrimination facing women and minorities, as well as campaigns led by organizations such as the Jewish Labour Committee, facilitated the emergence of a new legal regime.<sup>10</sup>

Ontario's pioneering 1944 *Racial Discrimination Act* prohibited any signs or publications expressing racial or religious discrimination. Saskatchewan's 1947 *Bill of Rights* recognized a broad range of human rights, from fundamental freedoms such as free speech to non-discrimination in employment and services.<sup>11</sup> But these laws were poorly enforced. As a result, beginning in 1951, several jurisdictions introduced Fair Employment and Fair Accommodation Practices statutes that prohibited discrimination in employment and housing (the 1960

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8. Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia: University of Pennsylvania Press, 2014) [Cardenas, *Chains*].
  9. William Pentney & Walter Tarnopolsky, *Discrimination and the Law: Including Equality Rights under the Charter* (Toronto: Carswell, 1985).
  10. Ruth Frager & Carmela Patrias, "'This Is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns" (2001) 82:1 Can Historical Rev 1 [Frager & Patrias]; Ruth A Frager & Carmela Patrias, "Human Rights Activists and the Question of Sex Discrimination in Postwar Ontario" 93:4 Can Historical Rev 563; Carmela Patrias, "Socialists, Jews, and the 1947 Saskatchewan Bill of Rights" (2006) 87:2 Can Historical Rev 265; Janet Miron, ed, *A History of Human Rights in Canada* (Toronto: Canadian Scholars Press, 2009); Jennifer Tunnicliffe, "'Life Together': Public Debates over Human Rights Legislation in Ontario, 1975-1981" (2013) 46:92 Soc Hist 443.
  11. *The Racial Discrimination Act*, SO 1944, c 51; *The Saskatchewan Bill of Rights Act*, SS 1947, c35.

*Canadian Bill of Rights* also contained anti-discrimination provisions).<sup>12</sup> Like their predecessors, though, these statutes lacked an effective enforcement mechanism. Fair Employment and Accommodation laws focused on punishment rather than prevention, and required evidence of intent as well as a high standard of proof. They were also restricted to discrimination on the basis of race, religion, and ethnicity. People were often reluctant to report discrimination while the judiciary was hesitant to treat discrimination as similar to a criminal act.<sup>13</sup>

Ontario's 1962 *Human Rights Code* established a transformative precedent in human rights law.<sup>14</sup> It prohibited discrimination in accommodation, employment, and services. Full-time human rights officers were hired to investigate complaints. If an individual had a legitimate complaint that fell within the mandate of the *Code*, the officer would first attempt conciliation. If this failed, the Commission could recommend that the case be sent to an independent board of inquiry or tribunal to impose a settlement. Perhaps the most important innovation—in addition to having the government absorb the cost of investigating the complaint—was that the commission could appear before the inquiry to represent the public interest. Complainants, therefore, did not have to shoulder the burden of investigating and litigating the case, which was an obstacle to seeking remedy through the courts. The purpose of the law was prevention rather than punishment. It did not require a criminal standard of proof. Offenders might pay a fine, offer an apology, reinstate an employee, or agree to a negotiated settlement.<sup>15</sup>

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12. *The Fair Employment Practices Act*, SO 1951, c 24; *The Fair Accommodation Practices Act*, SO 1954, c 28. For a comprehensive list of anti-discrimination and human rights statutes, see Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953–1984* (Vancouver: UBC Press and the Osgoode Society for Canadian Legal History, 2014) at 61, 78.

13. For a more detailed critique of past anti-discrimination laws, see Walter Surma Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: De Boo, 1982).

14. *The Ontario Anti-Discrimination Commission Act*, SO 1958, c 70; *The Ontario Human Rights Code*, SO 1961, c 93.

15. For further details on the design of human rights statutes, see Howe & Johnson, *supra* note 3; Walter Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46:4 Can Bar Rev 565; Cornish, Faraday, & Pickel, *supra* note 5.



By the late 1970s the federal government and every province had passed human rights statutes modelled on the Ontario legislation.<sup>16</sup> Although there were variations—such as what forms of discrimination to recognize—human rights legislation was largely uniform across the country.<sup>17</sup> These statutes applied to accommodation, employment, and services as well as to unions and business associations (often with exemptions for charitable and educational institutions). Every statute included an enforcement mechanism, formal inquiries, and a commission with an education mandate. The use of administrative tribunals rather than the courts became a defining feature of the Canadian model of human rights law. The courts, of course, continued to play a critical role in interpreting the law. But the vast majority of complaints were settled outside the courts, often during investigations or through informal mediation.<sup>18</sup> Tribunals (or boards of inquiry) were far more accessible, partly because the proceedings were more informal than a court, but also because human rights commissions helped complainants prepare and present their cases. Tribunals set legal precedents on a host of issues, from sexual harassment to arbitrary employment policies, and in doing so developed a corpus of human rights law. In addition to affirming victims' sense of grievance and demand for equal treatment, human rights law had symbolic value. Tribunals contributed to changing employers' behaviour and constructing a culture of rights by raising the level of public awareness. Human rights law was premised on the belief that discrimination was not necessarily motivated by hatred or fear, but through misunderstandings, discomfort, or confusion. As one

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16. Over time there have emerged some differences between jurisdictions. Saskatchewan's *Human Rights Act* prohibits discrimination in the contracting process and has a specific section on education (in other jurisdictions, education is covered as a public service). Criminal conviction or political beliefs are grounds for discrimination in some jurisdictions but not others. British Columbia exempts any form of discrimination in cases of bona fide occupation requirements, whereas the Saskatchewan statute applies bona fide occupational qualifications only to sex, ability, or age. British Columbia provides a general exemption for charitable and religious organizations; other jurisdictions provide exemptions only in specific instances. The Ontario statute does not apply when accommodation will cause undue hardship. The British Columbia statute has no similar clause, albeit the courts have interpreted British Columbia's legislation to mean the same thing.
  17. There is a duty to accommodate in most jurisdictions. Several statutes also recognize substantive or systemic discrimination. Affirmative action programs, sanctioned by human rights commissions, are permitted to address the legacy of generations of discriminatory treatment. Howe & Johnson, *supra* note 3; Langer, *supra* note 7.
  18. Clément, *supra* note 12; Howe & Johnson, *supra* note 3.

inquiry chairman noted, human rights laws aimed “to educate the public with respect to the need for tolerance as an essential weave in our social fabric.”<sup>19</sup>

Another feature of human rights law in Canada has been the practice of incorporating new grounds of discrimination over time. At first, statutes only banned racial, religious, and ethnic discrimination. Ontario’s *Human Rights Code* was limited to these grounds until an amendment in 1966 incorporated age discrimination.<sup>20</sup> British Columbia as well as Newfoundland and Labrador were, in 1969, the first jurisdictions to ban sex discrimination.<sup>21</sup> Similarly, the 1977 federal *Human Rights Act* recognized pardoned criminal conviction, privacy, marital status, and physical disability.<sup>22</sup> By the early 2000s, human rights statutes recognized race or colour, religion, ethnicity or national origin, place of origin, sex (e.g., sexual harassment, pregnancy), age, physical and mental disability, marital status, pardoned conviction, sexual orientation, family status, dependence on alcohol or drugs, language, social condition, source of income, seizure of pay, and political belief.<sup>23</sup> In 2015, Alberta joined a host of other jurisdictions in banning discrimination on the basis of gender identity.<sup>24</sup> In the same year, the Ontario Human Rights Commission revised its policy for interpreting “creed” to include non-religious belief systems that might influence a person’s identity, worldview, or way of life.<sup>25</sup> Until the 1990s, with the exception of racial discrimination in Ontario and Nova Scotia, the majority of discrimination complaints in Canada involved sex discrimination in the workplace. In recent years, however, most complaints have involved disability.<sup>26</sup>

Human rights law has also evolved to recognize the complex dynamics of discrimination, particularly in the way it is invisible and systemic. The Supreme

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19. University of British Columbia Rare Books and Special Collections, Vancouver Status of Women, v 2, f 46, *Yvonne Bill v JR Trailer Sales* (1977).
  20. *The Age Discrimination Act*, 1966, SO 1966, c 3.
  21. *An Act for the Promotion and Protection of the Fundamental Rights of the People of British Columbia*, SBC 1969, c 2; *An Act to Establish the Newfoundland Human Rights Code and to Provide for its Implementation*, SNL, 1969, c 75.
  22. *Canadian Human Rights Act*, SC 1976, c 33.
  23. Grounds of discrimination vary based on the jurisdiction.
  24. *Alberta Human Rights Amendment Act*, SA 2015, c 18.
  25. Ontario Human Rights Commission, *Policy on Preventing Discrimination Based on Creed* (2015) online: <[www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20based%20on%20creed\\_accessible\\_0.pdf](http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20based%20on%20creed_accessible_0.pdf)>.
  26. For statistics on complaints, see individual human rights commissions or tribunals’ annual reports. For an overview, see Howe & Johnson, *supra* note 3. On disability complaints to human rights commissions and tribunals, see Lisa Vanhala, *Making Rights a Reality: Disability Rights Activists and Legal Mobilization* (Cambridge, UK: Cambridge University Press, 2010).

Court of Canada confirmed in 1985 that human rights law prohibits systemic discrimination, such as the indirect effect of practices on classes of people.<sup>27</sup> It has also ruled that these statutes are quasi-constitutional.<sup>28</sup> In 1998, the *Canadian Human Rights Act* was amended to expand the definition of discrimination to include an intersectional analysis.<sup>29</sup> Human rights commissions and tribunals, as well as the courts, have embraced a substantive approach that recognizes the indirect and adverse effects of discrimination as well as acknowledging that equality should not necessarily be premised on treating everyone the same.

The Canadian model for human rights law is arguably among the most robust in the world: professional human rights investigators; public education; a commission promoting legal reform and representing complainants before formal inquiries; jurisdiction over the public and private sector; a focus on conciliation over litigation; independence from the government; and an adjudication process as an alternative to the courts.<sup>30</sup> Canada's system, of course, is far from perfect. It has been plagued with delays, underfunding, political interference, and weak accountability.<sup>31</sup> In 2005, an average case resolved before a tribunal in Ontario would take 28.8 months.<sup>32</sup>

Still, it is far more expansive and accessible than many other countries.<sup>33</sup> In Germany and Norway, for instance, the national human rights institution has a limited mandate for education and research. Many countries' national

27. *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd*, [1985] 2 SCR 536, 52 OR (2d) 799; *Bhinder and Canadian Human Rights Commission v CNR*, [1985] 2 SCR 561, 23 DLR (4th) 481.

28. *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145, 137 DLR (3d) 219; Day, "Reassessing," *supra* note 6.

29. In 1998, the *Canadian Human Rights Act* was amended to recognize that "a discriminatory practice includes a practice based on ... the effect of a combination of prohibited grounds." *An Act to Amend the Canada Evidence Act and the Criminal Code in Respect of Persons with Disabilities, to Amend the Canadian Human Rights Act in Respect of Persons with Disabilities and Other Matters and to Make Consequential Amendments to Other Acts*, SC 1998, c 9.

30. Cardenas identifies the following factors to evaluate the effectiveness of a national human rights institution: investigations and complaints; physical location; budgets; remedies; public hearings; reports; educational programs; creating space to dialogue on human rights; legitimizing claims; and facilitating the emergence of new rights claims. Sonia Cardenas, "Transgovernmental Activism: Canada's Role in Promoting National Human Rights Commissions" (2003) 25:3 Hum Rts Q 775.

31. Eliadis, *supra* note 5 at ch 4; Clément, *supra* note 12 at ch 9; Shelagh Day, "Impediments to Achieving Equality" in eds, Sheila L Martin & Kathleen E Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987). Cornish, Faraday & Pickel, *supra* note 5 at 22-23, 30.

32. Ontario Human Rights Commission, *Reviewing Ontario's Human Rights System: Discussion Paper*, (Toronto: Ontario Human Rights Commission, 2005) at 4.

33. Cardenas, *Chains*, *supra* note 8.

human rights institutions only have jurisdiction over the public sector. It is also uncommon to have full time investigators, or to have commissions that assist claimants in preparing their cases and representing the public interest before tribunals. The human rights infrastructure that enables people to seek restitution through administrative tribunals rather than the courts is another strength of the Canadian system.<sup>34</sup> As the Ontario Human Rights Commission has noted, “[E]stablishing an agency to address a specific area of law provides an identifiable institution to focus attention, develop expertise, formulate and promote the public interest, and respond to public complaints and concerns [and is cost effective].”<sup>35</sup> The civil court system, as the Commission points out, is inaccessible to most members of the public.<sup>36</sup>

Canada’s human rights system has expanded dramatically in size and scope since the 1970s. Combined funding for human rights commissions increased from \$3,226,036 in 1975 to \$12,659,325 in 1983.<sup>37</sup> Ontario alone had fourteen regional offices and thirty-three investigators by 1982.<sup>38</sup> There were nearly seven hundred tribunal decisions in Canada by 1981.<sup>39</sup> By 2012, there were over three thousand decisions in the *Canadian Human Rights Reporter* database.<sup>40</sup> Despite budget cutbacks in the 1990s, the number of complaints has, at the time of writing this article, never slowed. There was a dramatic increase in caseloads between 1980 and 1997 for the federal (432 to 2,025), Ontario (994 to 2,775) and British Columbia (828 to 1,439) commissions.<sup>41</sup> Nova Scotia’s Human Rights Commission reported an increase of almost four hundred per cent between 1981 and 2001.<sup>42</sup> In 2013–14, the Ontario Human Rights Tribunal’s caseload alone

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34. Cardenas, “Transgovernmental,” *supra* note 30.

35. Ontario Human Rights Commission, *supra* note 25 at 30.

36. The workings of the civil court system are governed by lengthy and complex rules, as well as by years of procedural jurisprudence. The civil court system traditionally offers little or no assistance to the unrepresented individual ... In contrast to the courts, administrative agencies are meant to offer a simpler streamlined process that allows for more speedy access to a hearing. (*Ibid* at 30).

37. Clément, *supra* note 12 at 173.

38. Attorney General’s Office, British Columbia Human Rights Branch, “Report on Human Rights Commission in Canada,” Acc 1989-700-42, 1980; Attorney General’s Office, Human Rights Branch, “Report on Human Rights Commissions in Canada,” Acc 1989-700-37, 2 November 1982.

39. Clément, *supra* note 12 at ch 9.

40. Canadian Human Rights Reporter, online: <www.cdn-hr-reporter.ca>.

41. Howe & Johnson, *supra* note 3 at 72.

42. Nova Scotia Human Rights Commission, *Final Report on the Public Consultations: Organizational Review of the Nova Scotia Human Rights Commission* (Halifax: Nova Scotia Human Rights Commission, 2001) at 2.

was 3,242 (with 2,994 outstanding cases at the end of the year).<sup>43</sup> In 2014–2015, the British Columbia Human Rights Tribunal received the largest number of new complaints in its history.<sup>44</sup>

Funding, however, has remained static. The Ontario Human Rights Commission's budget in 2004–2005 was \$12.6 million compared to \$11.4 million in 1995–1996.<sup>45</sup> The British Columbia Human Rights Tribunal's budget was \$3.036 million in 2015–16—the same amount it was in 2005–2006.<sup>46</sup> The Canadian Human Rights Commission's budget was \$22.4 million in 2005–2006, \$23 million in 2011–2012, and \$22.1 million in 2014–2015.<sup>47</sup> As budgets remain frozen—while inflation reduces budgets in real terms—and caseloads increase, the ability of human rights commissions and tribunals to fulfill their statutory mandate decreases every year.

## II. BACKLASH

Human rights law remains as relevant today as it was when the statutes were enacted. Discrimination on the basis of disability constitutes the largest number of complaints in every jurisdiction. But cases involving discrimination on the

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43. Social Justice Tribunals of Ontario, *Annual Report, 2013-2014*.

44. British Columbia Human Rights Tribunal, *Annual Report 2014-2015* (BC: 2015) online: <[www.bchrt.bc.ca/shareddocs/annual\\_reports/2014-2015.pdf](http://www.bchrt.bc.ca/shareddocs/annual_reports/2014-2015.pdf)>. See also Eliadis, *supra* note 5 at 110-13.

45. The combined budgeted in 2014-15 for the Ontario Human Rights Commission and Legal Support Centre was \$11.3 million (the Tribunal's budget is subsumed within the Social Justice Tribunals budget). Ontario Human Rights Commission, *supra* note 25.

46. British Columbia, British Columbia Human Rights Tribunal, *Annual Report 2005-2006* (BC: 2006) online: <[www.bchrt.bc.ca/shareddocs/annual\\_reports/2005-2006.pdf](http://www.bchrt.bc.ca/shareddocs/annual_reports/2005-2006.pdf)>; British Columbia, British Columbia Human Rights Tribunal, *Annual Report 2015-2016* (BC: 2016) online: <[www.bchrt.bc.ca/shareddocs/annual\\_reports/2015-2016.pdf](http://www.bchrt.bc.ca/shareddocs/annual_reports/2015-2016.pdf)>.

47. Canada, Canadian Human Rights Commission, *Annual Report 2011*, (Ottawa: Minister of Public Works and Government Services, 2012); Canada, Canadian Human Rights Commission, *People First: the Canadian Human Rights Commission's 2015 annual report to Parliament*, (Ottawa: Minister of Public Works and Government Services, 2016); Canada, Department of Finance Canada, "Public accounts for the Province of Canada, 1841-1867, Public accounts of the Dominion of Canada, 1868-1871, 1943-1947, Canada public accounts, 1885-1942" (Ottawa: Department of Finance, 2006).

basis of sex and race remain common.<sup>48</sup> Commissions, for example, have reported increases in complaints from women fired from their jobs for being pregnant.<sup>49</sup>

In a recent book on human rights in Canada, Shelagh Day, Lucie Lamarche, and Ken Norman argue that “many disturbing attacks have been made on human rights and human rights institutions over the last decade.”<sup>50</sup> The backlash has a long history, albeit it has gained momentum in recent years.<sup>51</sup> In 1984, the government of British Columbia was widely condemned for eviscerating its human rights statute.<sup>52</sup> The government eliminated the human rights commission, fired the investigators, and removed the mandate for education (a new government replaced the statute in 1996).<sup>53</sup> The justification was that people were abusing the human rights system by advancing vexatious claims that went beyond the commission’s mandate.<sup>54</sup> Ten years later, in Alberta, several submissions to the Human Rights Commission’s review called on the government to abolish the

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48. Social Justice Tribunals of Ontario, *Annual Report, 2013-2014*; Canadian Human Rights Commission, *Annual Report*, 2014.

49. *Lipp v Maverick's Sports Lounge*, 2014 BCHRT 199, BCWLD 6695; Natalie Stechyson & Bradley Bouzane, “Pregnant women targets of ‘medieval’ discrimination in Canada,” *National Post* (9 March 2012); “Company that dismissed pregnant B.C. employee ordered to pay \$11,000,” *Georgia Straight* (3 August 2012); Angela Hall, “Discrimination due to pregnancy flagged,” *Leader Post* (10 August 2011); Guelph Mercury, “Fired pregnant hair stylist awarded \$14,000,” *Guelph Mercury* (18 August 2013).

50. Day, Lamarche & Norman, *supra* note 2 at 2.

51. Part of the backlash is from stakeholders who want to strengthen the human rights system. Every major inquiry on human rights law in Canada since the 1990s has identified concerns among stakeholders. In particular, that commissions often act as gatekeepers and reject legitimate complaints. Stakeholders have also raised concerns about underfunding, a failure to address systemic discrimination, backlogs and delays, lack of public education, lack of transparency, and a focus on individual complaints. See, for instance, Ontario Human Rights Commission, *supra* note 25 at 6; New Brunswick Human Rights Commission, *Future Directions: Recommendations to Government* (Fredericton: New Brunswick Human Rights Commission, 2008) at A1-7. See also R Brian Howe & Malcolm J Andrade, “The Reputations of Human Rights Commissions in Canada” (1994) 9:2 CJLS 1; Langer, *supra* note 7.

52. Clément, *supra* note 12.

53. *Human Rights Act*, SBC 1984, c 22; *Human Rights Code*, RSBC 1996, c 210.

54. British Columbia, Hansard, 2nd Sess, (12 April 1984) at 4373. Bill Black, *BC Human Rights Review: Report on Human Rights in British Columbia* (Vancouver: Government of British Columbia, 1994) at 10-11. B.C. Human Rights Review: Report on Human Rights in British Columbia (Vancouver: Government of British Columbia, 1994). No less than the Minister of Labour, who was responsible for administering the legislation, called a case against a golf course that banned women a ‘frivolous’ complaint. Clément, *supra* note 12 at 128-29.

commission.<sup>55</sup> In fact, throughout the 1990s, several columnists in Canada's major newspapers routinely attacked human rights systems as "wide open to abuse," "kangaroo courts," or "incompetent, tyrannical, and foolish."<sup>56</sup>

The media's portrayal of human rights commissions in recent years has presented an image of overzealous bureaucrats who are abusing their mandate. "Human rights commissions" proclaimed the editors of *The Globe and Mail*, "were never intended to serve as thought police. ... It's time to rein them in before further damage is done to Canadians' right to free expression."<sup>57</sup> Several high-profile cases, including a complaint against Maclean's magazine for hate speech, have fuelled the backlash.<sup>58</sup> But hate speech is only the most visible manifestation of a backlash that is more profound. A columnist for the *National Post* who routinely attacks human rights commissions has characterized them as a "complainants forum" because they provide free counsel to complainants.<sup>59</sup> Similarly, a columnist for *The Globe and Mail* has described them as "self-perpetuating grievance machines."<sup>60</sup> In 2011, the editorial board for the *National Post* characterized human rights law as an "institutionalized bonanza for anyone who carries a grudge against his or her boss or landlord."<sup>61</sup> In 2016, the editorial board for the *Globe and Mail* drew on a familiar theme by condemning the ruling in the First Nations Child and Family Caring Society of Canada case as "judicial overstretch" and an attempt to

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55. Alberta Human Rights Review Panel, *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (Edmonton: Alberta Human Rights Commission, 1994) at 30-31, 72. In part, these concerns arose as a response to debates over sexual orientation, which produced a crisis for human rights statutes across the country that had not been seen since the laws were first introduced. Warner, *supra* note 7; Dominique Clément, *Human Rights in Canada: A History* (Kitchener: Wilfred Laurier University Press, 2016) [Clément, *Human Rights*]; Herman, *supra* note 7.

56. As quoted in Hester Lessard, "Backlash in the Academy: The Evolution of Campus Sexual Harassment Regimes" in *Reaction and Resistance: Feminism, Law, and Social Change*, eds. Dorothy E Chunn, Susan B Boyd & Hester Lessard (Vancouver: UBC Press, 2007) at 182-83.

57. "Human Rights Commissions: Shake that role of policing ideas," *The Globe and Mail* (4 February 2008).

58. Moon, *supra* note 4.

59. Margaret Wente, "A Day at the Theatre of the Absurd," *The Globe and Mail* (15 February 2008); Margaret Wente, "The Rights Revolution Run Amok," *The Globe and Mail* (26 February 2008); Rex Murphy, "Coming to a Human Rights Commission Near You," *The Globe and Mail* (25 January 2006).

60. *Ibid*; George Jonas, "George Jonas on the Trouble with Human Rights Commissions," *National Post* (8 April 2008); George Jonas, "Speech Commissars are the Problem," *National Post* (5 May 2006).

61. As quoted in Eliadis, *supra* note 5 at 112.



dictate federal spending policy.<sup>62</sup> Conservative pundits such as Tom Flanagan, Mark Steyn, or John Carpay routinely attack human rights commissions in the media. Concerns over vexatious claims or overreach have become a common feature of media coverage of human rights law.

Some political leaders have also encouraged the backlash. In the 1980s, the Social Credit government in British Columbia often criticized its own commission in public and eventually fired all the investigators and commissioners.<sup>63</sup> In the 1990s, the government of Alberta threatened to abolish the commission amidst debates over whether or not to ban discrimination on the basis of sexual orientation. In 1999, Stephen Harper characterized human rights commissions as “an attack on our fundamental freedoms and the basic existence of a democratic society.”<sup>64</sup> Jason Kenny, then a leading figure in the Conservative Party, spoke out in 2008 against the “dangerous” and “illiberal” tactics of people complaining to human rights commissions.<sup>65</sup> The former leader of the Ontario Conservative Party, Tim Hudak, at one time threatened to abolish the Human Rights Commission unless there were major reforms.<sup>66</sup> Alberta’s Wildrose Party election platform in 2012 claimed that “the Human Rights Commissions in Alberta have probably been the single worst offender of Rights.”<sup>67</sup> The party proposed eliminating the Human Rights Commission and sending all complaints to court.<sup>68</sup> The backlash has generated such intense criticism—often misleading—that the Canadian Bar Association felt compelled to publish a brief in 2010 defending human rights law.<sup>69</sup>

The backlash, however, has been especially manifest in legal reform. In 2003, the British Columbia government passed legislation that again abolished the Human Rights Commission while simultaneously repealing equal pay for work of equal value and the employment equity program.<sup>70</sup> The reforms introduced a direct-access model: a Human Rights Tribunal that is responsible for receiving,

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62. Editorial, “Native child welfare, yes; judicial overstretch, no,” *The Globe and Mail*, (1 May 2016).

63. Clément, *supra* note 12 at ch 9.

64. As quoted in Eliadis, *supra* note 5 at 152.

65. As quoted in *ibid* at 14.

66. Robert Benzie, “Rift opens in Tory race over human rights agency,” *Toronto Star* (21 May 2009).

67. Wildrose Party, *Policy Green Book (Human Rights)*, online: <[www.wildrose.ca](http://www.wildrose.ca)>

68. Wildrose continues to criticize the Commission and the legislation. Wildrose, Press release, “Mihaly case more proof Human Rights Commission is broken,” (24 February 2014), online: <[www.wildrose.ca/mihaly\\_case\\_more\\_proof\\_human\\_rights\\_commission\\_is\\_broken\\_saskiw](http://www.wildrose.ca/mihaly_case_more_proof_human_rights_commission_is_broken_saskiw)>.

69. Canadian Bar Association, *Hate Speech under the Canadian Human Rights Act* (Ottawa: Canadian Bar Association, 2010) at 2.

70. *Human Rights Code Amendment Act*, SBC 2002, c 62.



adjudicating, and settling complaints. The former commission's education mandate was eliminated. Funding was cut, and there was no mandate for legal research, reform, or initiating complaints. There are no human rights investigators or a commission that has carriage of complaint. The direct-access model forces complainants to seek support from the BC Human Rights Clinic, which is operated by an underfunded non-governmental organization.<sup>71</sup>

Reforms to the Ontario system were not as extreme, but they deviated from the Canadian model. In 2008, the province created a direct access system where a tribunal is responsible for all aspects of the complaints process.<sup>72</sup> Ontario, British Columbia, and Nunavut are the only jurisdictions in Canada that have no investigatory mandate. The commission in Ontario, however, was maintained. It is responsible for education and, although it is uncommon, can initiate complaints or represent individuals before the Tribunal. A Human Rights Legal Support Clinic was created to assist individuals through the process of filing a complaint. It was designed to represent individuals before tribunal proceedings but, in practice, most complainants appear before the Human Rights Tribunal without legal counsel.<sup>73</sup> In theory, the direct-access model dispenses with the gatekeeper and allows people to go directly to a hearing to consider the merits of their complaints. The system, however, is plagued with delays. More people are self-represented before tribunals in Ontario and British Columbia than other jurisdictions. Complainants often lack the investigatory powers and expertise to prepare a case properly for a formal hearing.

Meanwhile, in 2011, the government of Saskatchewan eliminated its Human Rights Tribunal, and now requires victims to seek restitution in court.<sup>74</sup> This was done, according to the government, to make the process "more effective and efficient."<sup>75</sup> The new legislation created a higher standard of proof for submitting complaints (replacing reasonable grounds with sufficient evidence), while expanding the commissioner's power to dismiss complaints. The legislation also

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71. For a detailed study of the human rights system in British Columbia, see Day, "Government Hostility, Systemic Discrimination, and Human Rights Institutions" [Day, "Government"] in eds, Shelagh Day, Lucie Lamarche & Ken Norman, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).

72. *An Act to amend the Human Rights Code*, SO 2006, c 30.

73. Michelle Flaherty, "Ontario and the Direct Access Model to Human Rights" in eds, Shelagh Day, Lucie Lamarche & Ken Norman, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).

74. For an analysis of the amendments in Saskatchewan, see Genevieve Leslie, "Saskatchewan and the Gatekeeping Debate" in eds Shelagh Day, Lucie Lamarche & Ken Norman, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).

75. Saskatchewan, *Hansard*, Vol 53 No 19A (30 November 2010) at 6291.

empowers the Chief Commissioner to dismiss complaints arbitrarily for “having no regard to all of the circumstances” or if a hearing “is not warranted.”<sup>76</sup>

The backlash has also resulted in several minor reforms. In 2009, Alberta’s *Human Rights Act* was amended to permit parents to bring teachers before a tribunal for teaching about religion, sex, or sexual orientation without their consent.<sup>77</sup> This unusual and unprecedented provision essentially made teaching, in some circumstances, a human rights violation (the provision remained in force until it was removed in 2014).<sup>78</sup> In 2013, the federal government amended the *Canadian Human Rights Act* by removing the hate speech provisions.<sup>79</sup> It has also engaged in litigation to resist broad interpretations of the law.<sup>80</sup> At the same time, in Quebec, the Parti Québécois proposed to place its controversial *Charter of Quebec Values* in the province’s human rights legislation. The statute would have banned public servants from wearing any religious symbol of a certain size (a small cross chain was acceptable, but not a niqab or a kippah). The province’s own human rights commission condemned the bill as discriminatory.<sup>81</sup> The government was defeated in 2014, however, and the proposal never became law.

### III. RENEWING CANADA’S HUMAN RIGHTS SYSTEM

There have been at least a dozen reviews of human rights law in Canada since the 1970s: Ontario (1977, 1992, 2005), Alberta (1994), British Columbia (1983, 1994, 1998), Saskatchewan (1996), Federal (2000), Nova Scotia (2001,

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76. *The Saskatchewan Human Rights Code*, SS 2010, c 39.

77. *Human Rights, Citizenship and Multiculturalism Amendment Act*, SA 2009, c 26.

78. Ironically, the 2009 reforms included a formal recognition that discrimination on the basis of sexual orientation was banned under the statute, which had been the practice since the Supreme Court of Canada’s ruling in 1998.

79. *An Act to Amend the Canadian Human Rights Act*, SC 2013, c 37.

80. Gwen Brodsky, “Governments as Interpreters and Shapers of Human Rights” in eds Shelagh Day, Lucie Lamarche & Ken Norman, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014).

81. Annabelle Blais, “Charte: La Commission des droits de la personne defend sa position,” *La Presse* (17 January 2014).

2002), Quebec (2003) and New Brunswick (2004, 2008).<sup>82</sup> These reports reflect a general consensus around several principles: Human rights statutes should have primacy above other laws. Commissions and tribunals should be independent from government, including operational and financial autonomy as well as security of tenure. Agencies should be engaged in education, prevention, mediation, processing complaints, advising governments, and initiating complaints in the public interest. They should also be accessible and, if possible, operate offices in multiple regions. Every major investigation into human rights law in Canada has further concluded that governments need to improve access to complaint resolutions, reduce delays, increase community engagement, prioritize

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82. New Brunswick Human Rights Commission, *supra* note 51; Ontario Human Rights Commission, *supra* note 25; Quebec Human Rights Commission, *Après 25 Ans: La charte québécoise des droits et libertés: bilan et recommandations* (Toronto: Ontario Human Rights Commission, 2003); Nova Scotia Human Rights Commission, *Moving Forward with Human Rights in Nova Scotia: The Path for the Future*, (Halifax: Nova Scotia Human Rights Commission, 2002); Wanda Thomas Bernard, Viola Robinson & Fred Wien, *Final Report on the Public Consultations: Organizational Review of the Nova Scotia Human Rights Commission*, 21 July 2001, online: <humanrights.novascotia.ca/sites/default/files/HRREVIEW.pdf>; Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Act Review Panel* (Ottawa: Parliamentary Research Branch, 2000); Black, *supra* note 54; Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, 1992); Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: The Commission, 1977); British Columbia Human Rights Commission, *How to Make It Work: A Report of the B.C. Human Rights Commission on Strengthening the Statutory Protection of Human Rights* (Victoria: British Columbia Human Rights Commission, 1983); Alberta Human Rights Review Panel, *supra* note 55; William Black & Kathryn Thomson, *Report on Legal Representation Models under the British Columbia Human Rights Code* (Victoria: Queen's Printer, 1998); Saskatchewan Human Rights Commission, *Renewing the Vision: Human Rights in Saskatchewan* (Regina: SHRC, 1996).

education, and reinvest in their human rights systems.<sup>83</sup> Overall, human rights systems should be less reactive and more proactive in eliminating discrimination.

## A. LEGAL REFORM

The original anti-discrimination laws passed in the 1940s and 1950s were discredited because of weak enforcement mechanisms, lack of support for victims, and a focus on punishment rather than prevention. Yet there are many parallels between these policies and recent reforms. Reforms to the Saskatchewan legislation, in particular, represent a striking departure from the Canadian model. The most prominent change was requiring complainants to seek redress in court.<sup>84</sup> Administrative tribunals are more accessible than a court, which is intimidating for many people, especially those who are likely to experience discrimination. As the Ontario Human Rights Commission's 2005 discussion paper pointed out, "effectively designed administration agencies provide simplified operations and active support for individuals working through their processes. As a result they should allow greater access to the layperson and reduce disadvantage to unrepresented parties."<sup>85</sup> Moreover, without the tribunal, Saskatchewan has stopped training genuine human rights experts to adjudicate disputes, leaving it up to judges with minimal experience in handling discrimination cases.

The Saskatchewan statute also allows the commission to dismiss a complaint if the victim refuses a 'reasonable' offer during mediation. This provision undermines the principle of conciliation. Canadian human rights law was founded on the belief that discrimination is often inadvertent or based on a misunderstanding. Conciliation leads to understanding and tolerance through dialogue and

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83. Some inquiries have suggested that the commission report directly to the legislature. On the one hand, this ensures greater autonomy; on the other hand, there are potential problems, such as struggling to secure an adequate budget without a minister advocating for the agency. Other reports discuss the possibility of permanent tribunals. In Nova Scotia, for instance, an ad hoc board of inquiry is appointed by the government to hear a case that cannot be resolved by mediation. There are problems, however, with this system:

Ad hoc tribunals have a number of limitations. One is that the process of naming such a tribunal inevitably takes some time and contributes to delays. A second is that the use of ad hoc tribunals can make it more difficult to hear the complaint promptly, since the member or members of the tribunal almost always have other permanent jobs that limit the timing of a hearing. Perhaps the most important disadvantage is that the arrangement does not allow the tribunal to develop expertise over time because there is little or no continuity in the appointments. (Black, *supra* note 54 at 73).

84. The Commission referred 37 complaints to the court of Queen's Bench between 2012 and 2014. Saskatchewan Human Rights Commission, *Annual Report*, 2013-2014.

85. Ontario Human Rights Commission, *supra* note 32 at 31.

consensus. It is essential, though, that any informal dialogue be voluntary. Unfortunately, the Saskatchewan reforms empower the Chief Commissioner to force complainants to engage in mediation. While there are benefits to mediation such as securing quicker resolutions, there are drawbacks.<sup>86</sup> There is pressure on complainants to accept an offer. Saskatchewan's Chief Commissioner can dismiss the complaint if they feel a fair offer has been rejected. In essence, the respondent loses nothing if they make a weak offer, but a complainant runs the risk of having their case dismissed if they reject an offer. There are, in fact, several problems with mediation including delays and confidential settlements that do nothing to address the systemic problems that produce discrimination.<sup>87</sup> Finally, the amendments also eliminated the requirement that the commission publicly report on its activities. This policy undermines one of the central features of human rights law: promoting a culture of rights and discouraging discrimination by reporting on successful cases.

The direct access models in Ontario and British Columbia are similarly in danger of replicating some of the deficiencies of past anti-discrimination laws.<sup>88</sup> A central aspect of the Canadian model is providing assistance to complainants,

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86. As Genevieve Leslie explains, there are drawbacks to mediation:

Directed mediation compels complainants to participate in a process they may find intimidating because of power imbalances, the discrimination they have experienced, and the threat that their complaints will be terminated if they reject an offer the Chief Commissioner considers fair and reasonable—a vague, discretionary standard which may shift over time. However, the provision contains no penalties for respondents who fail to make a fair and reasonable offer of settlement. If this happens, the complaint simply proceeds to a hearing as it would have if the directed mediation provision had not been added to the *Code*. (Leslie, *supra* note 74 at 158-59).

See also New Brunswick Human Rights Commission, *supra* note 51 at A2-25.

87. In his 1995 report on human rights legislation in British Columbia, Bill Black rejected forced mediation:

Mediation is unlikely to change the attitude of the respondent if the respondent is forced to take part against its will. If mediation is forced on a complainant, it either will fail or will create undue risk of pressuring the complainant to accept a settlement felt to be unjust. ... In addition, compelling a complainant to engage in negotiations or discussions with a respondent may exacerbate the emotional impact of the discrimination that gave rise to the complaint and replicate the power imbalances that contributed to the discrimination. (Black, *supra* note 54 at 71).

88. A report produced by the International and Human Rights Law Association at the University of Victoria in 2006 argued that the British Columbia legislation is inconsistent with the Paris Principles, which suggest basic guidelines for a National Human Rights Institution. International and Human Rights Law Association, *Route 64 - Another Detour on the Road to Equality* (Victoria: International and Human Rights Law Association, 2006).

who are often the most marginalized people in our community.<sup>89</sup> Although human rights commissions do not appear before a tribunal to represent the complainant—technically, they represent the public interest—in practice the commission’s lawyer presents the case and makes representations on behalf of the claimant. In Quebec, where complainants at one time could represent themselves before the tribunal, or in the United Kingdom where complaints could be filed directly with the tribunal, it was rare for people without representation to win their case.<sup>90</sup> The most likely targets of discrimination are those who lack resources, whether they are temporary foreign workers serving coffee at Tim Hortons or immigrants stocking shelves in grocery stores.<sup>91</sup> Such cases pit individuals against employers or service providers who are more likely to be able to afford effective representation. As the Canadian Human Rights Act Review Panel noted, the “process is often complicated and requires experience in human rights in order to assemble and argue a case successfully. In the human rights context, many claimants do not speak either official language or have disabilities that may make it difficult for them to access the system.”<sup>92</sup> It was, in fact, a concern that the direct access model would provide little support to complainants that prompted the Chair of Ontario’s Human Rights Commission in 2008 to oppose the reforms.<sup>93</sup>

In defending the direct-access model, British Columbia’s Attorney General had declared that “complaints will no longer be lost in the dark void of endless and inconclusive investigations.”<sup>94</sup> And yet the reforms have failed to reduce delays and costs substantially. Although human rights commissions have been

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89. *An Act to amend the Human Rights Code*, SO 2006, c 30. The Ontario Human Rights Commission retains the power to represent people before the Ontario Human Rights Tribunal in special cases. In practice, it rarely uses this power. In 2003, the British Columbia Human Rights Clinic was created and operated by the British Columbia Human Rights Coalition and the Community Legal Assistance Society. It assists in preparing complaints to the British Columbia Human Rights Tribunal, and can represent people during the hearing. But representation is not guaranteed. BC Human Rights Clinic, online: <[www.bchrc.net](http://www.bchrc.net)>; Flaherty, *supra* note 73.

90. Canadian Human Rights Act Review Panel, *supra* note 82 at 74.

91. “Individuals who experience severe discrimination on an ongoing basis are less likely to have the same educational opportunities and the same knowledge of the legal system as those who seldom experience discrimination. Thus, the factors that contribute to discrimination also would seem to cause inequality of protection.” Black also notes other obstacles to a direct-access model, including difficulties filling out forms, distrust of government or a sense that a complaint was futile. Black, *supra* note 54 at 33-35.33-5.

92. The report noted that many respondents in human rights complaints are governments or corporations. Canadian Human Rights Act Review Panel, *supra* note 82 at 74.

93. Eliadis, *supra* note 5 at 94.

94. British Columbia, *Hansard*, 6th Sess (23 October 2002) at 3989.

fairly criticized for acting as gatekeepers, they nonetheless ensure greater access to legal redress.<sup>95</sup> One of the concerns expressed by the Nova Scotia Human Rights Commission about the direct access model was that it might intimidate people facing a more “legalistic, rigid framework.”<sup>96</sup> Besides, the direct access model simply shifts the gatekeeping role to a tribunal, which can more easily dismiss complaints. In British Columbia, the Human Rights Tribunal spends more time vetting complaints for dismissal than adjudicating the merits of human rights complaints.<sup>97</sup> Tribunals have no investigatory powers or carriage of complaint. In order to be effective, the state must ensure access to vulnerable populations for seeking redress through human rights law. Complainants should be represented before tribunals at public expense. Direct access models have the potential to be effective, but only if there is some guarantee of representation before tribunals.

The direct access model also places too much focus on responding to individual complaints, which fails to address the public interest in eliminating discrimination.<sup>98</sup> As former investigator and commission chairperson Shelagh Day explains, the Canadian model is based on the premise that “complaints of discrimination were not viewed merely as disputes between private parties, but rather as matters in which the community as a whole has a stake.”<sup>99</sup> The Supreme Court of Canada has ruled that the purpose of human rights law is not to punish individuals.<sup>100</sup> The failure to create an accessible enforcement mechanism as well as the focus on punishment was, in fact, the main reason why governments replaced weak anti-discrimination statutes with human rights legislation.<sup>101</sup>

## B. EDUCATION

Legal reform is critical, but it is only the beginning. Human rights commissions need to reinvigorate their education mandate, which was a cornerstone of the original model. Every inquiry into the enforcement of federal and provincial human rights law in Canada has found that there is an over-emphasis on

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95. Leslie, *supra* note 74.

96. Nova Scotia Human Rights Commission, *supra* note 42 at 11.

97. International and Human Rights Law Association, *supra* note 88 at 56-60.

98. Day, “Government,” *supra* note 71.

99. *Ibid* at 23.

100. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

101. Frager & Patrias, *supra* note 10; Shirley Tillotson, “Human Rights Law as Prism: Women’s Organizations, Unions, and Ontario’s Female Employees Fair Remuneration Act, 1951” (1991) 72:4 Can Historical Rev 532.

individual complaints.<sup>102</sup> In the 1990s, the Alberta Human Rights Commission was diverting staff from education to deal with a growing caseload of complaints.<sup>103</sup> More recently, the Canadian Human Rights Act Review Panel noted that the federal commission was shifting resources from education to address individual complaints. And yet the demand for educational programs is increasing. The Ontario Human Rights Commission conducted 38 public events in 1995–96 for 1384 people; in 2004–2005 the commission conducted 96 public education events for 7500 people.<sup>104</sup> As the first Chair of the New Brunswick Human Rights Commission has explained, the “most important function of the Commission would be this public education, would be the proactive changing of attitudes, of changing social values of the community and being very much a human relations commission.”<sup>105</sup> Similarly, the Canadian Human Rights Act Review Panel argued that

one of the most important aspects of promoting equality is the need to educate those who must provide equality and those who need equality about the meaning and intent of the Act with respect to how equality should be achieved.<sup>106</sup>

Education is one of the few common factors among National Human Rights Institutions (NHRIs) around the world. It is the one area in human rights policy where there is almost universal consensus. NHRIs in the Asia-Pacific region and South Africa, in particular, have been successful in developing innovations in education.<sup>107</sup> Many of these innovations could be implemented in Canada such as advertising in ethnic and mainstream newspapers or radio; hosting national forums and workshops; producing films; public hearings; translating materials into minority languages; and training community leaders (the Czech Republic

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102. Canadian Human Rights Act Review Panel, *supra* note 82; William Black, “Reassessing Statutory Human Rights Legislation Thirty Years Later: Human Rights Enforcement in British Columbia: A Case Study” (Ottawa: Human Rights Research and Education Centre, 1995); Black, *supra* note 54; Ontario Human Rights Code Review Task Force, *supra* note 82; Ontario Human Rights Commission, *supra* note 32.

103. Alberta Human Rights Review Panel, *supra* note 55 at 54.

104. Ontario Human Rights Commission, *supra* note 32 at 13.

105. As quoted in New Brunswick Human Rights Commission, *supra* note 51 at A1-9.

106. Furthermore, the panel noted that

human rights education and promotion are understood by community groups, labour organizations, employers and government agencies to be essential in addressing human rights issues in Canada. Both employers and labour organizations agreed that education in the workplace is fundamental to addressing existing human rights concerns and preventing future violations. (Canadian Human Rights Act Review Panel, *supra* note 82 at 41).

107. Cardenas, *Chains*, *supra* note 8.



ombudsperson even had a reality television show). The Canadian Human Rights Act Review Panel recommended that the federal commission coordinate attempts to share resources and expertise among its provincial counterparts. There was no need, for instance, for each jurisdiction to have separate brochures and other materials on the meaning of harassment.<sup>108</sup>

One possible model for placing a greater emphasis on education was pioneered in British Columbia in 1974. A separate Human Rights Branch processed complaints so that the Human Rights Commission could focus exclusively on education. The Commission produced its own educational materials while, at the same time, providing grants to community organizations to develop educational programs.<sup>109</sup> Another model is the current practice in Alberta. The commission administers a Human Rights Education and Multiculturalism Fund that dispenses grants to community groups for education programs. In 2014–15, the fund distributed almost \$1 million.<sup>110</sup> There are also ample opportunities for partnerships with institutions including the Human Rights Research and Education Centre at the University of Ottawa or the Canadian Museum for Human Rights. Technology offers additional opportunities. The Ontario, Alberta, and Federal commissions, for instance, have recently experimented with webinars and eLearning.

Education should ensure that people are aware of the legislation and how to file complaints. It should also make it easier for organizations to comply with the law. More fundamentally, education should promote tolerance. Unlike past anti-discrimination statutes, human rights laws were designed to focus on prevention rather than punishment.<sup>111</sup> Human rights commissions need funding to take a proactive role in promoting awareness on issues such as discrimination on the basis of gender identity and expression. The symbolism of recognizing in law the rights of people who are gender non-conforming is a powerful resource

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108. Canadian Human Rights Act Review Panel, *supra* note 82 at 42.

109. Clément, *supra* note 12.

110. Alberta Human Rights Commission, *Annual Report, 2014-2015*.

111. Blair Mason, a future chairman of the Alberta Human Rights Commission, insisted that education was a central feature of human rights law: "Education is the greatest form of prevention because what you understand you don't fear. Every time you're able to establish teamwork with different cultures and you begin to realize the uniformity of human nature regardless of our race, creed, whatever, and the richness of that diversity, you begin to appreciate how strong a society could be if all of that was integrated." Jim Gurnett, "Oral Histories" in eds Dominique Clément & Gerry Gall, *Alberta Legacies* (Edmonton: John Humphrey Centre for Peace and Human Rights, 2011). Similarly, Maria Montgomery & Stephanie Drake argue that education "is the foundation upon which the whole human rights project rests." International and Human Rights Law Association, *supra* note 88 at 29.

for social change—but only if people are aware of the law.<sup>112</sup> Yet most human rights commissions do not even have a dedicated budget line for education. The weak or nonexistent education mandates in British Columbia and Ontario, as well as underfunding in other jurisdictions, ignores the fundamental nature of the Canadian model.<sup>113</sup> As the federal review panel noted in 2000, “when individuals understand their rights and the rights of others they are less likely to violate those rights.”<sup>114</sup>

### C. ENGAGING ABORIGINAL PEOPLES

Human rights commissions should prioritize greater engagement with Aboriginal peoples. With a few exceptions, most of the inquiries on human rights laws since the 1970s did not address the unique issues facing Aboriginal peoples.<sup>115</sup> Moreover, until recently, the *Indian Act* was exempted from the *Canadian Human Rights Act*.<sup>116</sup> Yet Aboriginal peoples suffer disproportionately from discrimination, and are often triply disadvantaged because they are poor and women. Aboriginal peoples rank last in most studies on equality: they are overrepresented in prisons and face discrimination in bail and sentencing; their life expectancy is significantly shorter than other groups; they have higher rates of unemployment and suicide; and fewer than ten per cent have a post-secondary degree.<sup>117</sup>

The need to focus on Aboriginal peoples is especially critical because there is a long history of lack of engagement with human rights commissions. In part, this was because of a mistrust of the colonial state, a perception that the law is ineffective, the belief that individual rights are at odds with collective values, and a fear that their community will exclude them if they make a claim against

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112. As Didi Herman notes, “organizations and individuals have proceeded on the law front with the belief that law reflects societal fears and prejudices ... progressive law reform signals to bigots, and to those who would discriminate, that such attitudes and behaviours are no longer acceptable.” Herman, *supra* note 7 at 4.

113. For a more detailed critique of the British Columbia Human Rights Tribunal and education, see International and Human Rights Law Association, *supra* note 88.

114. Canadian Human Rights Act Review Panel, *supra* note 82 at 42.

115. The discussion on Aboriginal peoples in the federal report in 2000 was largely limited to whether or not the statute should be amended to remove the exemption for the *Indian Act*. The Alberta (1994), Nova Scotia (2001), and Quebec (2003) reports included only brief discussions on Aboriginal peoples. The Quebec report, however, offers the strongest recommendations for reform. The committee recommended that the statute recognize a right to self-determination as well as a preamble to acknowledge Aboriginal rights.

116. *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30.

117. Lorne Tepperman, James Curtis & Albert Kwan, *Social Problems: A Canadian Perspective* (Toronto: Oxford University Press, 2011) at 78-79, 357.

a local government.<sup>118</sup> One of the few attempts to reach out to Aboriginal peoples was in New Brunswick between 1982 and 1992. The so-called 'native desk' failed to develop a relationship with its constituency and only investigated little over one hundred cases.<sup>119</sup> Inquiries by the federal government (2000) and the Government of Nova Scotia (2001) noted that there was confusion among Aboriginal peoples over whether or not human rights complaints were matters of federal or provincial jurisdiction. The latter found that "people living on reserves especially feel unprotected on matters pertaining to human rights."<sup>120</sup> Because of the control exercised by the Chief and Council, especially in determining employment on the reserve, people were afraid to file complaints.<sup>121</sup>

The First Nations Caring Society case exemplifies how human rights law can be a vehicle for promoting Aboriginal people's human rights. Aboriginal peoples' organizations are also increasingly engaging with human rights policy and law—although few organizations participated in the hearings around the 1977 federal *Human Rights Act*, dozens of groups participated in the 1980–81 hearings over the proposed *Charter of Rights and Freedoms*, and many responded to the Canadian Human Rights Act Review Panel's deliberations in 2000.<sup>122</sup> But human rights commissions often have a low profile among people living on reserves. They can better engage with Aboriginal peoples by, for instance, regularly visiting reserves as well as hiring Aboriginal people who speak Aboriginal languages. There should be education projects for Aboriginal peoples. Commissions can

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118. Allan McChesney, "Aboriginal Communities, Aboriginal Rights, and the Human Rights System" in ed Abdullahi Ahmed An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, (Philadelphia: University of Pennsylvania Press, 1992); Peter Kulchinsky, *Aboriginal Rights Are Not Human Rights* (Winnipeg: ARP Books, 2013); JR Miller, "Human Rights for Some: First Nations Rights in Twentieth-Century Canada" in eds Stephen Heathorn & David Goutor, *Taking Liberties: A History of Human Rights in Canada* (Toronto: Oxford University Press, 2013); Eliadis, *supra* note 5 at 135-38; Shannon Williams, "Human Rights in Theory and Practice: A Sociological Study of Aboriginal Peoples & the New Brunswick Human Rights Commission, 1967-1997" (Master of Arts, University of New Brunswick, 1998).

119. Williams, *ibid.*

120. Nova Scotia Human Rights Commission, *supra* note 42 at 15.

121. *Ibid* at 16.

122. There still remains some hesitation among Aboriginal peoples regarding human rights. For instance, the Mohawks of Kahnawake have argued that the application of the federal *Human Rights Act* to reserves is an imposition of foreign values and law. It violates the principle of self-government. The law places a focus on individual claims against the community rather than collective values. Canadian Human Rights Act Review Panel, *supra* note 82 at 128-29; Clément, *Human Rights*, *supra* note 55. On Aboriginal peoples and human rights, see Miller, *supra* note 118; Kulchinsky, *supra* note 118.

also educate Aboriginal people about how to assert their rights, especially those who are marginalized on reserves or fear retaliation. Speaking out publicly on human rights issues of concern to Aboriginal people can further foster positive relations.<sup>123</sup> In addition, the federal and provincial commissions or tribunals should cooperate to allow on-reserve Aboriginal people to submit complaints through provincial offices that can be forwarded to the federal agency.<sup>124</sup>

#### D. RESEARCH

One of the primary recommendations arising from Nova Scotia's 2001 review was to pursue partnerships with educational and research organizations.<sup>125</sup> There has been a dramatic reduction in public funding in recent years for agencies that produce research.<sup>126</sup> The federal government, for instance, eliminated the Law Reform Commission and the Court Challenges Program. These programs provided invaluable research on social problems to assist non-governmental organizations in their advocacy. Research is an essential component of advocacy as well as developing human rights policy. Human rights commissions are among the few remaining public agencies that are still in a position to fund research. Before it was eliminated in 2002, British Columbia's Human Rights Commission was among the most active agencies in the province in developing research and promoting awareness of human rights issues.<sup>127</sup> As with education, human rights commissions across the country are conducting less research as they shift resources to adjudicating complaints.<sup>128</sup> And yet research can support the complaints system by examining issues such as gender identity and expression or gender-variant and gender-fluid. It is worth noting that, as scholars of transnational social movements have amply demonstrated, producing information is often the precursor to social change.<sup>129</sup>

Research includes promoting awareness of the law at home and abroad. The Paris Principles, which recommend a set of basic principles for national human

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123. Nova Scotia Human Rights Commission, *supra* note 42 at 16.

124. There were also several submissions to the federal review panel that recommended a prohibition of discrimination against non-status Aboriginal people in access to programs and services. Canadian Human Rights Act Review Panel, *supra* note 82 at 129.

125. Nova Scotia Human Rights Commission, *supra* note 42 at 5.

126. Rachel Laforest & Michael Orsini, "Evidence-Based Engagement in the Voluntary Sector: Lessons from Canada" (2005) 39:5 Soc Pol'y & Admin 481.

127. International and Human Rights Law Association, *supra* note 88 at 40-44.

128. *Ibid* at 46.

129. Margaret E Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

rights institutions, recognize the need for research to monitor compliance with the law.<sup>130</sup> The Principles also acknowledge the need to promote human rights beyond a country's borders. The Canadian Human Rights Act Review Panel affirmed this role for the federal commission.<sup>131</sup> Canada has an established human rights legal system that can act as a model for other countries. Promoting awareness of the law can also have domestic benefits. The *Charter of Rights and Freedoms* has, in a much shorter period than human rights statutes, become a powerful symbol for national unity. Even in Quebec, the Charter enjoys widespread support.<sup>132</sup> This serves to discourage political leaders from, among other things, using the notwithstanding clause to override the *Charter*. Fostering public support for human rights law would be one way of resisting attempts to impose further regressive legal reforms. And there is precedent for governments mobilizing public support in this way. In 1968, the federal government provided funding in each province to create human rights associations to promote the anniversary of the Universal Declaration of Human Rights.<sup>133</sup> The Parliamentary hearings around the *Charter of Rights and Freedoms*, which included funding for organizations to attend hearings in Ottawa, also served to mobilize public support.<sup>134</sup> More recently, the Canadian Museum for Human Rights instigated widespread consultations across the country in 2009–10 to develop content for the museum.<sup>135</sup>

## E. ADVOCACY AND COMMUNITY ENGAGEMENT

Human rights commissions should be advocates. They need to be proactive in resisting legislative reform and exploring new strategies for engaging the state and the community. The need for commissions to act as advocates is particularly acute in small provinces where there are no human rights advocacy

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130. Details on the Paris Principles and National Human Rights Institutions are available through the United Nations Office of the High Commissioner, online: <[www.ohchr.org/EN/Pages/Home.aspx](http://www.ohchr.org/EN/Pages/Home.aspx)>.

131. Canadian Human Rights Act Review Panel, *supra* note 82 at 42.

132. "Quebeckers Support Patriation of Constitution, Charter of Rights and Freedoms in New Poll," *Canadian Press* (10 December 2011).

133. Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982* (Vancouver: UBC Press, 2008) at 179 [Clément, *Canada's Rights*].

134. LAC, *Statistical Account of Written Submissions - Special Joint Committee on the Constitution* (26 January 1981, RG 14, sess 1, box 68, wallet 1).

135. Content Advisory Committee, *Final Report* (Winnipeg: Canadian Museum for Human Rights, 2010); Clément, *Human Rights*, *supra* note 55.

organizations.<sup>136</sup> Again, there is precedent. The pioneers who led the first human rights commissions, such as Daniel G. Hill (Ontario), Gordon Robertson (Canada), and Kathleen Ruff (British Columbia), had a reputation for advocacy and criticizing their own governments.<sup>137</sup>

There are myriad ways in which National Human Rights Institutions around the world function as advocates that can easily be replicated in Canada. These strategies include counselling or challenging governments on human rights issues; lobbying for treaty ratification; advising governments on legal reform; submitting amicus briefs in key cases; documenting wrongdoing; reviewing national policies and practices; issuing reports on national situations; holding public inquiries; training professionals; disseminating international human rights treaties; coordinating education programs; cooperating with non-governmental organizations and treaty bodies; and networking with institutions at home and abroad.<sup>138</sup> One submission to the Nova Scotia review in 2001 suggested that the commission should “speak out on the important human rights issues of the day, such as the conflict over the Aboriginal fishery or the Acadian school issue ... not in the sense of taking sides but in the sense of public education and advocacy around the need to respect human rights as these issues are addressed.”<sup>139</sup>

Many human rights commissions in Canada already engage with community groups.<sup>140</sup> Human rights law is somewhat unique in that it depends on community organizations for drafting, reforming and enforcing the law.<sup>141</sup> Commissions should continue to foster these relationships. The 2011 reforms in Saskatchewan, for instance, were done without any substantive consultation with community

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136. The lack of human rights advocacy groups was noted in the Nova Scotia review in 2011. Since the 1980s, most of the human rights organizations in Canada have become defunct except in the more populous provinces. Nova Scotia Human Rights Commission, *supra* note 42 at

9; Clément, *Canada's Rights*, *supra* note 133.

137. Clément, *supra* note 12 at ch 6, 9; Daniel G Hill, “The Role of a Human Rights Commission: The Ontario Experience” (1969) 19 UTLJ 390; Jennifer Tunnicliffe, *The Ontario Human Rights Code Review, 1975-1981: A New Understanding of Human Rights and Its Meaning for Public Policy* (MA Thesis, University of Waterloo Faculty of Arts, 2006) [unpublished].

138. Cardenas, *Chains*, *supra* note 8.

139. Nova Scotia Human Rights Commission, *supra* note 42 at 4.

140. Langer, *supra* note 7.

141. Clément, “Social Movement,” *supra* note 7.

groups.<sup>142</sup> As it stands, there are too few public advocates to defend human rights law and agencies from misleading criticism, especially in the media.

One strategy that was employed by the Canadian Museum for Human Rights was to recruit ambassadors from across the country. The museum's National Advisory Council included representatives from academia, social movements, the media and organized labour. They had no role in governance. Instead, their role was to meet throughout the year to consult with staff to develop content and priorities for the institution. The project was based on the assumption, that when they returned to their communities, they could be ambassadors for the institution. This was not a formal role. Members of the Council did not receive direction from the museum. Rather, the presumption was that transparency and knowledge of the institution would improve the relationship between the institution and the community. Human rights commissions can benefit from a similar strategy by inviting members of the community to participate in their planning sessions, especially in education programs. They would have no governance role but, instead, provide voice for the community. Developing such a relationship with the community would increase the likelihood of having defenders speak out publicly against those misconceptions surrounding human rights law that fuel the backlash.

#### IV. CONCLUSION

Human rights commissions and tribunals are facing a difficult future. They are confronted with new grievances while the number of complaints continues to grow. Funding has been cut or remained static. This dilemma is exacerbated by the need to address long-standing grievances, most notably discrimination facing Aboriginal peoples, which require a renewed commitment from governments. Meanwhile, several recent legal reforms have undermined many of the strengths of the Canadian model for human rights law.

Placing these developments within historical context suggests that there is a better way forward. Several recent reforms are reminiscent of past anti-discrimination laws that focused on punishing individual acts of discrimination. Those discredited laws placed the burden of enforcement on individuals who experienced discrimination and were most likely marginalized. The Canadian model for human rights law pioneered in the 1960s was designed to be accessible and to focus on prevention. Training professional investigators

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142. Ken Norman, "The Wrong Moves for Saskatchewan Human Rights" *Canadian Human Rights Reporter* (31 October 2013).

and representing complainants before tribunals is an effective model for ensuring access for marginalized peoples. As does providing an adjudication system through administrative tribunals. The Canadian model was also premised on a concern with prevention through education. It is essential to renew this mandate. Human rights law represents, at its most basic, a public commitment to eradicate discrimination.